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Courtesy copy, original filed by ECF, Docket No.: CV-10-4661

September 22, 2011

BY HAND/ECF

Honorable Steven M. Gold  
Chief Magistrate Judge  
United States District Court  
Eastern District of New York  
225 Cadman Plaza, Room 13D  
Brooklyn, New York 11201

Re: Rodriguez v. St. Vincent's  
Services, et al  
Civil Docket No.: 10-CV-4661

Patrick Alford v. The City of  
New York, et al  
Civil Docket No.: 11-CV-1583  
10-CV-04661

P.A., Jr. v. City of New York; et al  
Civil Docket No.: 10-CV-04661

Our File No.: 06100-16617

Dear Judge Gold:

We respectfully submit this letter in reply to the opposition posed by counsel for P.A. Jr. ("P.A.") to the application made on behalf of defendants St. Vincent's Services, Inc., s/h/a St. Vincent's Services Incorporated, Carlene Anderson, and Zoila Villalta in the above-referenced matters.

The concern of our letter motion was that contrary to the implication of counsel's letter, prior requests for expedited discovery were quite specific and limited. Counsel for P.A.

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sought "...to request a conference for our proposed motion for expedited discovery of the files of the New York Police Department ("NYPD") pertaining to the investigation into P.A.'s disappearance conducted over the past eighteen months (the "Investigative File")...." (Emphasis added) A copy of counsel's application of August 31, 2011 is annexed for the convenience of the Court.

At the August 2, 2011 appearance before Your Honor, P.A.'s request for immediate discovery of the investigative file was denied on the basis that counsel had filed a Notice of Appearance but no pleading. At the time of that conference it was made clear that the scope of the request was limited to an "expedited discovery of the NYPD investigative file."

This Court issued an Order, dated September 1, 2011, noting that the "...initial conference previously scheduled for January 26, 2011 will instead be held at 12:00 p.m. on September 27, 2011. Counsel are to comply with the original Scheduling Order dated 10/12/11, docket entry no. 2...." (sic) We found the wording of the Magistrate's Order troubling but reasonably assumed that, once again, the issue was being limited to P.A.'s desire for expedited discovery of the NYPD investigative file. At the telephone conference conducted on September 15, 2005 - at which your correspondence's sole participation was to request that the conference be placed on-the-record, which request was denied - the issue was again focused solely on the production of the NYPD investigative file and the co-defendant City's reply to P.A.'s opposition to the assertion of a "police privilege."

Our fear is that there is a push to transform the original singularly limited discovery request from one for particular documents from a particular defendant to an all-encompassing "scheduling conference" which would indeed be unduly burdensome and duplicative of effort.

With respect to the case oft-cited by P.A.'s counsel, Hollins v. U.S. Tennis Ass'n, 469 F.Supp.2d 67 (E.D.N.Y. 2006) is the equally oft-quoted bromide that "[t]he mere filing of a motion to dismiss does not constitute 'good cause' for the issuance of a stay" this reliance is inopt.

Conspicuously absent is any discussion of the criteria set forth in Hollins, supra, in which the Court expressly stated there are several factors to be considered in such instances. The factors have been listed as (1) whether the defendant has

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made a strong showing that the plaintiff's claim is unmeritorious; (2) the breadth of discovery and the burden of responding to it; and (3) the risk of unfair prejudice to the party opposing the stay. The Court in Hollins noted that a Court may also "...take into consideration the nature and complexity of the action, whether some or all of the defendants have joined in the request for a stay, and the posture or stage of the litigation...." Indeed the Court in Williams v. New York State Office of Mental Health, 2011 U.S. Dist. LEXIS 61266 (E.D.N.Y., 4/25/11) stated that "(a) stay of discovery pending resolution of a potentially dispositive motion is appropriate 'where the motion appear[s] to have substantial grounds or stated another way, do[es] not appear to be without foundation in law.'" (Emphasis added) Citing Johnson v. N.Y. Univ. Sch. of Educ., 205 F.R.D. 433, 434 (S.D.N.Y. 2002).

The motions to dismiss each of these actions assert several grounds, among them the failure of the individual Complaints to state a claim under 42 U.S.C. §1983; the Rooker-Feldman doctrine which bars review by the District Court of the underlying State Court judgment; and that the individual City defendants are entitled to various qualified and absolute immunity defenses.

We would urge that the courts have consistently also looked to the "posture of the litigation..." Hollins, supra, Computer Associates International, Inc. v. Simple.Com, Inc., 247 F.R.D. 63 (E.D.N.Y. 2007), etc. in invoking Rule 26(c) of the F.R.C.P. to implement "...appropriate control over the discovery process...."

We should also hasten to remind this Court that, although this case was filed on October 12, 2010, as we have previously advised there have been a series of successive and overlapping procedural developments ranging from the conducting of a pre-motion conference at the outset of the proceedings, successful motions to dismiss, the introduction of new plaintiffs, the subsequent dismissal, *sua sponte*, of several causes of action of the adult plaintiffs, the appointment of counsel for P.A., etc.

It is respectfully submitted that this matter is still at a preliminary stage and any discovery would likely be highly burdensome including involving a great deal of information of numerous parties - all while motions to dismiss are to be argued on October 12, 2011.

While we once again take no position with respect to the assertions by the Municipal defendants regarding the "police privilege" and the attendant burden of providing the NYPD's

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"investigative files", we would urge that at this very preliminary stage of the proceeding to compel the identification of experts, interrogatories, etc. the burden imposed by a full blown discovery on the defendants while dismissal motions are being argued is great. We urge that the process employed by the Williams Court in "...weighing the potential burden of responding to discovery against a potential prejudice to the plaintiff" should be carefully considered.

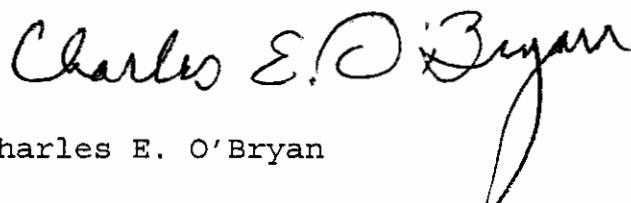
None of the litigants can at this point successfully predict the procedural posture of this case following the October 12, 2011 appearance for oral arguments. The motions to dismiss have not been argued nor has a decision been rendered.

It is respectfully submitted that in the instance where motions are pending, both defendants oppose the propose broadening of the scope of discovery, inherent in the "rescheduling of the [original] scheduling conference...]" which was never conducted nor formally adjourned that an adjournment of the conference of September 27, 2011 be granted.

We are merely asking for an adjournment of the September 27th conference until a resolution of the motions or more to the point a return to the original scope of discovery demand - namely the issue of whether the NYPD investigative file should be released at this point.

We thank the Court in advance for its attention to this matter.

Respectfully submitted

  
Charles E. O'Bryan

CEO/dml  
Enclosure

cc: VIA HAND/ECF

Honorable John Gleeson  
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Eastern District of New York  
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September 22, 2011

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August 31, 2011

**BY ECF**

Honorable Steven M. Gold  
United States Chief Magistrate Judge  
United States District Court  
225 Cadman Plaza East  
Brooklyn, New York 11201

RE: P.A., Jr. v. City of New York, et al., 10-CV-04661

Dear Judge Gold:

As Your Honor is aware, we represent P.A., Jr. ("P.A."), a minor, in the above-captioned action. Pursuant to Paragraph 2.A of Your Honor's Individual Practices and Local Rule 37.3(c), we write to request a conference for our proposed motion for expedited discovery of the files of the New York Police Department ("NYPD") pertaining to the investigation into P.A.'s disappearance conducted over the past 18 months (the "Investigative File").

On August 2, 2011, Your Honor denied P.A.'s request for immediate discovery of the Investigative File on the grounds that the Second Amended Complaint ("SAC") was not yet on file:

Discovery is limited to information relevant to the claims and defenses in the action. We don't know what the claims in the action are because the complaint hasn't been filed. We don't know what the defenses in the action are because there's been no response to the complaint. That's why it's so extraordinary to even ask or much less receive discovery before the complaint is filed.

(08/02/11 Tr. at 29:6-14.)

On August 5, 2011, P.A. filed the SAC, a copy of which we enclose. Even a cursory review of the SAC establishes that the Investigative File is discoverable under Fed. R. Civ. P. 26 because its contents could help locate P.A. and lead to the discovery of admissible evidence bearing on several issues directly relevant to P.A.'s

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claims, including but not limited to (1) P.A.'s own first-hand testimony of the facts alleged about him in the SAC, (2) the circumstances surrounding his disappearance, (3) his condition while in the City's protective custody, and (4) his treatment while in such custody by individuals acting under color of state law. Accordingly, pursuant to Fed. R. Civ. P. 26(d)(1), it is now squarely within the Court's authority to order immediate production of the Investigative File prior to the Rule 26(f) conference. See Fed. R. Civ. P. 26(d)(1); Ayyash v. Bank Al-Madina, 233 F.R.D. 325, 326-27 (S.D.N.Y. 2005).

The vast majority of courts have adopted a "good cause" standard to determine whether to exercise their well-established authority to order expedited discovery. See, e.g., Stern v. Cosby, 246 F.R.D. 453, 457 (S.D.N.Y. 2007); Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Secs Dealers, Inc., No. 07 Civ. 2014, 2007 WL 1121734, at \*5 (S.D.N.Y. Apr. 11, 2007); Ayyash, 233 F.R.D. at 327; see also 8A Charles Alan Wright et al., Federal Practice and Procedure § 2046.1 (3d ed. 2011).<sup>1</sup>

Applying this "good cause" standard, courts examine expedited discovery requests "on the entirety of the record to date and the *reasonableness* of the request in light of all the surrounding circumstances." Ayyash, 233 F.R.D. at 327 (quotation omitted). "Good cause" may be found whenever "the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." Semitool, Inc. v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002).

Here, "the need for expedited discovery" of the Investigative File could not be greater. As we established in our letters dated July 5, 2011 and August 1, 2011, and during the August 2, 2011 conference, the City does not deny that the Investigative File is necessary for us to have any chance whatsoever of locating our client—a central witness whose testimony is plainly important. Despite the City's avowed satisfaction with its failed investigation into P.A.'s disappearance,<sup>2</sup> and its

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<sup>1</sup> Recent decisions have properly criticized the 30-year-old decision by Judge Edelstein in Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982) (imposing a preliminary injunction like test, to which a few courts adhere), stressing that "the intention of the [Federal Rules] is to confide the matter [of expedited discovery] to the Court's discretion, rather than to impose a specific and rather stringent test." Ayyash, 233 F.R.D. at 326; accord Semitool, 208 F.R.D. at 276. Moreover, the driving concern of Notaro, which involved a party seeking leave of court to take an otherwise-barred deposition within thirty days following commencement of the action, was to avoid undermining Rule 30(a)—a provision that "protects defendants from unwarily incriminating themselves before they have a chance to review the facts of the case and retain counsel." Notaro, 95 F.R.D. at 404-05. Here, there is no need for such protection because the City is a sophisticated party represented by counsel, and this action has been pending for eleven months. In any event, as demonstrated below, P.A. would satisfy any heightened standard under Notaro because he would be irreparably harmed by having to wait for production of the Investigative File and there is no burden on the City in having to produce it.

<sup>2</sup> See 08/02/11 Tr. at 18:25-19:1 ("I am very impressed by how much has been done").

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praise for the so-called "A Team" it supposedly assigned to the investigation, we are results-oriented and extremely concerned that as time passes the trial continues growing colder and the likelihood of finding P.A. and preserving his important testimony becomes more remote. Courts routinely grant expedited discovery, including where, as here, it is necessary to preserve the testimony of witnesses or where it is necessary to prevent prejudice or irreparable harm. See Cook v. Williams, No. 4:09-CV-1375, 2009 WL 3246877, at \*1 (E.D. Mo. Oct. 6, 2009) (ordering expedited discovery of plaintiff with terminal cancer on the grounds that he might not be available to testify at a later date); 19th St. Baptist Church v. St. Peters Episcopal Church, 190 F.R.D. 345, 351-52 (E.D. Pa. 2000) (granting immediate discovery to perpetuate testimony of individual plaintiffs who were elderly).<sup>3</sup> Here, expedited discovery of the Investigative File is necessary because it represents the only chance to attempt to preserve P.A.'s testimony.

On the other hand, the prejudice to the City in having expedited production of the Investigative File is non-existent. Indeed, the City has never claimed that the Investigative File cannot be readily produced, and it has been aware of our narrowly-tailored request for over two months. See Semitool, 208 F.R.D. at 276-77 (noting that "the requested information is relevant and will be produced in the normal course of discovery," and "[d]efendants have had notice of the instant motion and specific discovery sought for nearly a month"). Moreover, the resources to attempt to locate P.A. will not come from the City, and, if successful, would eliminate the need for the NYPD to expend additional resources to search for P.A., which it claims to be doing.

Rather, the City predicates its resistance to production on its erroneous contention that the law enforcement privilege protects the Investigative File from disclosure. The applicability of this privilege has no bearing whatsoever on the timing of production or the propriety of our request to expedite discovery. In the event that the Court rules that the privilege does not apply, as we respectfully submit it should, P.A. will be irreparably harmed by having to wait for production of this file.<sup>4</sup>

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<sup>3</sup> See also JP Morgan Chase Bank, N.A. v. Reijtenbagh, 615 F. Supp. 2d 278, 282-83 (S.D.N.Y.2009) (granting expedited discovery to plaintiffs to determine the location of missing art pledged as collateral for \$50 million promissory note); Monsanto Co. v. Saucedo, No. 4:10-CV-2249, 2011 WL 65106, at \*2 (E.D. Mo. Jan. 7, 2011) ("as time passes, the likelihood of discovering evidence relevant to their claims will decrease"); see also Stern, 246 F.R.D. at 457; Ayyash, 233 F.R.D. at 326-27.

<sup>4</sup> Finally, the City's stated intention to file a motion to dismiss the Complaint does not warrant a stay of discovery, as "[t]he mere filing of a motion to dismiss does not constitute 'good cause' for the issuance of a stay." Hollins v. U.S. Tennis Ass'n, 469 F. Supp. 2d 67, 78 (E.D.N.Y. 2006); see also Gray v. First Winthrop Corp., 133 F.R.D. 39, 40 (N.D. Cal. 1990) ("Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect."); accord Del Vecchio v. Amazon.com, No. C11-0366RSL, 2011 WL 1585623 (W.D. Wash. Apr. 27, 2011).

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Respectfully submitted,

/s/ Jonathan J. Lerner  
Jonathan J. Lerner

/s/ Robert A. Fumerton  
Robert A. Fumerton

Encl.

cc: All counsel (via ECF)